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No. 88-428

In the Supreme Court of the United States

OCTOBER TERM, 1988

C. WILLIAM VERITY, JR.,
SECRETARY OF COMMERCE, ET AL., PETITIONERS

v.

CENTER FOR ENVIRONMENTAL EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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9 pp

TABLE OF AUTHORITIES

Page

Cases:

Blau v. *Lehman*, 368 U.S. 403 (1962) 5

United States v. *Board of Comm'rs of Sheffield*, 435 U.S. 110 (1978) 5

Statutes:

Driftnet Impact Monitoring, Assessment, and Control Act of 1987, Pub. L. No. 100-220, Tit. IV, § 4001, 101 Stat. 1477 (to be codified at 16 U.S.C. 1822 note) 6

Magnuson Fishery Conservation and Management Act, § 204(b), 16 U.S.C. 1824(b) 2

Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, 102 Stat. 4755 ..... 2, 5

Marine Mammal Protection Act of 1972, 16 U.S.C. (& Supp. IV) 1361 *et seq.* 1, 2, 3, 4, 6

North Pacific Fisheries Act, 16 U.S.C. 1021 *et seq.* 3

Miscellaneous:

134 Cong. Rec. S17118 (daily ed. Oct. 21, 1988) 2

H.R. Rep. 100-970, 100th Cong., 2d Sess. (1988) 3, 4, 5

Marine Mammal Protection Act Authorizations: Hearing on H.R. 4819 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 100th Cong., 2d Sess. (1988) 4

S. Rep. 100-592, 100th Cong., 2d Sess. (1988) 4

24 Weekly Comp. Pres. Doc. 1566 (Nov. 23, 1988) 2

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We demonstrated in our petition for a writ of certiorari that there is no merit to the court of appeals' ruling that the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. (& Supp. IV) 1361 *et seq.*, allows the Secretary of Commerce to issue a permit for the incidental taking of a nondepleted species of marine mammal only when the Secretary can further determine that a permit may likewise issue for any other marine mammal species that will be incidentally taken during the same fishing activities. Respondent Federation of Japan Salmon Fisheries Cooperative Association (Federation) agrees with our analysis and supports the petition. Respondents Center for Environmental Education (CEE) and Kokechik Fishermen's Association (Kokechik) both defend the court of appeals' reasoning and also argue that further review is not warranted because supervening federal legislation establishes the correctness of that court's ruling and undermines its importance.

On October 21, 1988 (after we filed our petition), Congress passed the Marine Mammal Protection Act Amendments of 1988 (1988 MMPA Amendments) (see 134 Cong. Rec. S17118), which the President signed on November 23, 1988 (see 24 Weekly Comp. Pres. Doc. 1566). See Pub. L. No. 100-711, 102 Stat. 4755 (1988) (reprinted at Resp. CEE Br. in Opp. App. 1a-35a).[1] We do not dispute that the 1988 MMPA amendments decrease the immediate importance of the case. Unlike respondents CEE and Kokechik, however, we do not believe that Congress's recent action either constitutes congressional ratification of the lower court's ruling or so diminishes the importance of the case as to render further review inappropriate.

1. Contrary to respondents' contentions (Resp. CEE Br. in Opp. 15-18; Resp. Kokechik Br. in Opp. 21-25), the 1988 MMPA Amendments are anything but congressional ratification of the court of appeals' construction of the MMPA. Those amendments instead express Congress's immediate and obvious displeasure with the lower court's rewriting of the MMPA's permitting scheme.

The 1988 MMPA Amendments reflect Congress's determination not to allow the court of appeals' construction of the MMPA to be applied so as to prevent fishing by domestic fishing vessels and by other foreign vessels. Hence, the new law exempts until 1993 all vessels of the United States and all vessels (*i.e.*, foreign) holding a permit to fish pursuant to Section 204(b) of the Magnuson Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. 1824(b), from the MMPA's moratorium on the taking of marine mammals (see Resp. CEE Br. in Opp. App. 2a) and provides the Secretary of Commerce with express authority to allow the type of commercial

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[1] In our petition, we described Congress's active consideration of amendments to the MMPA (see Pet. 13 n.5).

fishing activity at issue in this case. Under the new law, the above-described vessels may engage in commercial fishing activities that will result in the incidental taking of a nondepleted species even if those same activities will also result in the incidental taking of a species for which a permit cannot issue (either because the species is depleted or because there is inadequate information to make a formal determination of the status of the species' population) (see *id.* at 4a). Indeed, the amendments *extend* the rights of those fishing vessels by affirmatively authorizing their incidental taking of those other species in specified circumstances (*ibid.*).[2]

Respondents' sole support for its ratification theory is the fact that Congress was aware of the impact of the court of appeals' decision on the Federation, but chose not to "disturb" the court's ruling to that extent (see Resp. Kokechik Br. in Opp. 23-24 (quoting H.R. Rep. 100-970, 100th Cong., 2d Sess. 21 (1988)); Resp. CEE Br. in Opp. 14 (quoting same)).[3] Respondents, however, misappre-

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[2] As our petition explains (at 16-17), the Secretary does not contend that the MMPA authorizes him to allow the incidental taking of a depleted species or a species for which there is insufficient information to make a formal determination of the species' population status. He simply maintains that the MMPA does not forbid him from issuing a permit for the incidental taking of a nondepleted species whenever a species for which a permit could not issue would also be taken by the same fishing activities. But under the Secretary's view of the MMPA (prior to the 1988 amendments), any taking of the nonpermitted species would, of course, remain unlawful and thus punishable under the Act.

[3] The Federation cannot take advantage of the interim relief provided by the 1988 amendments because, unlike other foreign vessels, the Federation's vessels do not engage in salmon fishing in the United States Exclusive Economic Zone pursuant to the Magnuson Act. Their fishing is instead authorized by the North Pacific Fisheries Act, 16 U.S.C. 1021 *et seq.*

hend Congress's purpose. Congress did not adopt the court of appeals' analysis of the MMPA permitting scheme. Nor did Congress determine that the Federation must remain subject to the permitting scheme embraced by the court of appeals. Congress simply chose to minimize the adverse effects of an intermediate appellate court's misconstruction of a federal statute, without disrupting the rights of the parties to that ongoing litigation. Whether such a limitation was sound policy can be debated,[4] but it is not tantamount to legislative ratification of the lower court's ruling.

Significantly, respondents fail to cite any statement made by Congress in enacting those amendments that affirmatively suggests that the court of appeals had correctly interpreted the requirements of the MMPA. Nor do respondents otherwise offer any indication that Congress intended, in effect, to foreclose the Secretary from seeking this Court's review of the court of appeals' ruling. Because, moreover, as respondents acknowledge (Resp. CEE Br. in Opp. 14 n.7; Resp. Kokechik Br. in Opp. 22, 26), Congress was aware that the court of appeals' decision remained subject to reversal by this Court and that the Secretary was seeking Supreme Court review (see S. Rep. 100-592, 100th Cong., 2d Sess. 16 (1988); *Marine Mammal Protection Act Authorizations: Hearing on H.R. 4819 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 100th Cong., 2d Sess. 216, 224 (1988) (testimony of William Evans, Under Secretary of Commerce)), the absence of any such intimation in the legislative history cannot be attributed to mere over-

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[4] The Secretary recommended to Congress that it provide relief from the court of appeals' decision to the Federation. See H.R. Rep. 100-970, *supra*, at 38.

sight. In our view, Congress's decision not to "disturb" the lower court's ruling must be read in light of its awareness of the possibility of further judicial review and therefore reflects Congress's determination not to interfere with this Court's ability to undertake its own independent examination of the merits of the dispute.[5]

2. Unlike respondents, we also believe that the dispute remains sufficiently important following enactment of the 1988 MMPA Amendments to continue to warrant this Court's review. To be sure, the interim relief provided by Congress since we filed our petition substantially diminishes the adverse effects of the court of appeals' ruling. The 1988 MMPA Amendments effectively forestall, until after October 1993, much of those devastating consequences to commercial fishing by domestic and foreign vessels in United States waters that our petition predicted would occur absent this Court's or Congress's intervention (see Pet. 12-13, 22-24). Indeed, that is why the Secretary generally supported the 1988 amendments.[6]

In our view, however, the lower court's ruling remains sufficiently important to warrant this Court's attention.

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[5] Neither *United States* v. *Board of Comm'rs*, 435 U.S. 110 (1978) nor *Blau* v. *Lehman*, 368 U.S. 403 (1962), cited by respondent Kokechik (Br. in Opp. 21-22), supports its ratification theory. In *Board of Comm'rs of Sheffield*, Congress affirmatively "voice[d] its approval" of the statute's prior construction (see 435 U.S. at 134). In this case, rather than voice its approval, Congress amended the statute to provide interim relief from the court of appeals' ruling to many and otherwise chose not to "disturb" a ruling that remained subject to further review. And, in contrast to the situation here, the court of appeals' construction of the federal statute at issue in *Blau* v. *Lehman* does not appear to have been similarly subject to further review at the time that "Congress * * * left the Act as it was" (368 U.S. at 413).

[6] Of course, the Secretary did not support Congress's decision not to extend similar interim relief to the Federation. See H.R. Rep. 100-970, *supra*, at 38.

The Federation, which represents a fleet of approximately 129 Japanese "catcherboats" operating from "motherships" (see Pet. App. 41a), remains subject to the court of appeals' decision and Congress has provided domestic and other foreign fishing vessels with only "interim" relief from that decision. Hence, the more widespread impact of the court of appeals' reconstruction of the MMPA has been delayed, but not prevented.

In any event, the foreign policy implications of the Federation's current plight are enough, by themselves, to prompt the Executive Branch to continue to seek this Court's review. In order to persuade the Government of Japan to continue to work within existing international fishery agreements, the Departments of Commerce and State believe that serious efforts must be made to afford Japanese vessels a fair opportunity to fish pursuant to these agreements under this nation's laws.[7] For the reasons explained in our petition, we submit that the decision below has erroneously deprived those vessels of fishing rights by misinterpreting the applicable statutes.[8] We therefore continue to urge review by this Court—both in light of our government's international commitments to a

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[7] The Department of Commerce reports that the continued application of the court of appeals' ruling to the Federation has been a principal barrier to successful negotiations to place observers on other Japanese fishing vessels pursuant to the Driftnet Impact Monitoring, Assessment, and Control Act of 1987, Pub. L. No. 100-220, Tit. IV, § 4001, 101 Stat. 1477 (to be codified at 16 U.S.C. 1822 note).

[8] Because respondent Kokechik's extended defense of the merits of the court of appeals' ruling (see Br. in Opp. 9-21) simply repeats the errors of that court already explained in our petition, we have not here further addressed the merits of the case.

particular friendly nation and in furtherance of overall efforts to achieve marine mammal protection.

It is therefore respectfully submitted that for the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

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